



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MVM, Inc.; Cook International, Inc.; Special Investigations, Inc.; and Varicon, Inc.

File: B-237620

Date: March 13, 1990

Dario O. Marquez, for MVM, Inc.; Clarence Cook, for Cook International, Inc.; Horace Cavitt, for Special Investigations, Inc.; Herb Saunders, for Varicon, Inc., the protesters.

William F. Riley, Department of the Treasury, for the agency.

Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where contracting agency's justification for challenged procurement is reasonable and protesters have not demonstrated that requirements exceed government's needs, protest that procurement is unnecessary is denied.

2. Contracting officer's decision to procure services on an unrestricted basis, and not through a small business set-aside, is not an abuse of discretion where the contracting officer's knowledge of the market did not support an expectation that offers from two or more responsible small business concerns would be received; where the level of service is considerably greater than those of current set-aside procurements; and where the agency small business program manager concurs with the decision not to set aside the procurement.

DECISION

MVM, Inc., Cook International, Inc., Special Investigations, Inc. and Varicon, Inc., protest the decision of the U.S. Customs Service, Department of the Treasury, to issue request for proposals (RFP) No. CS-89-071. The protesters argue that the solicitation, which was issued on an unrestricted basis, should be canceled or at the least be a small business set-aside. The solicitation is for

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background investigation services on an indefinite quantity basis for a base year and up to 4 option years.^{1/}

We deny the protest.

The Customs Service issued this RFP on October 3, 1989, for the purpose of supplementing four existing contracts, one with each of the protesters, which were awarded under 100 percent small business set-asides in 1988. The term of these existing contracts was from the date of award through September 30, 1988, with 2 option years. Both option years on each contract have been exercised and all four protesters' existing contracts will expire on September 30, 1990.

The protesters' contracts were intended to supplement a fifth contract with MSM Security Services, Inc., which has been in place since 1986. This contract was also awarded under a 100 percent small business set-aside for the contract period of October 29, 1986 through September 30, 1987 with 2 option years.^{2/} Both option years were exercised and the contract was extended, based on a sole-source justification, through January 31, 1990, only insofar as it provides certain clerical and support personnel at the Customs Service Headquarters.

Essentially, the protesters question the need for this procurement, arguing that they can do the work called for by this new solicitation under their existing contracts. They contend that each of them has the capacity for additional work since none has received more than 45 percent of the maximum number of cases that could be assigned under the existing contracts. Alternatively, they argue that at the very least, this procurement ought to be set aside for small business concerns.

Generally, the determination of the government's minimum needs and the best method of accommodating them are primarily the responsibility of contracting agencies; consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. New York Wire Co., B-235821, Sept. 19, 1989, 89-2 CPD ¶ 246.

1/ The base contract period of the RFP is from December 1, 1989 through September 30, 1990; the 4 option years run from October 1, 1990, through September 30, 1994.

2/ MSM Security Services, Inc., has since become a large business.

The Customs Service states that it anticipates that more than 6,000 background investigations will be required in 1990. According to the agency, under the current contracts, the four small business firms will only be able to conduct a maximum of 1,175 background investigation cases. Further, the agency submitted data that indicates that it assigned almost twice the minimum number of cases to each firm but asserts that it has documented unsatisfactory work performed by three of the four contractors and has notified each of these firms of these performance problems. Based on these facts, the agency determined that it was necessary to solicit for additional contractual coverage.

The protesters argue that the agency's calculation of the minimum and maximum number of cases is inconsistent with clauses in their contracts. The protesters allege that the only case limits established were for each order. They contend that although the agency could not place more than one order for the maximum number of cases within any 7-day time frame, there was no limit on the total number of orders that could be placed.

The difference of opinion between the protesters and the agency about what their contracts require is understandable. We have examined the contract language, and it is not at all clear whether there is an annual maximum on cases that may be assigned, and if so, what the maximum is. If the protesters believe that the Customs Service is ordering services in a manner inconsistent with their contracts, they must resolve the matter under the disputes clause of the contracts and the Contract Disputes Act of 1978. 41 U.S.C. § 601-13. The protesters do not refute the agency's case load estimate, but simply state that they can do any additional work the agency may give them. As discussed below, given the agency's concern with the performance problems with the current contracts and the projected workload, we conclude that the Customs Service has justified its need for this procurement and the protesters have not demonstrated that the determination to issue the solicitation has no reasonable basis.

Since the services sought under the RFP had been successfully acquired in 1986 and in 1988 on the basis of small business set-asides, the current procurement is subject to certain requirements concerning repetitive set-asides. Federal Acquisition Regulation (FAR) § 19.501(g) provides that once a service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements for that particular service shall, if required by agency regulations, be acquired on the

basis of a repetitive set-aside. Here, agency regulations do so provide. Treasury Acquisition/Procurement Regulation (TAPR) § 1019.501(c).

Both FAR §§ 19.501(g) and 19.502-2, however, provide that a set-aside shall not be made if the contracting officer does not have a reasonable expectation of receiving offers from at least two responsible small business concerns and at reasonable prices. The protested RFP was not set aside because the contracting officer found that she did not have a reasonable expectation that offers would be obtained from at least two responsible small business concerns. Generally, we regard such a determination as a matter of business judgment within the contracting officer's broad discretion which we will not disturb absent a clear showing that it has been abused. Universal Hydraulics, Inc., B-232144, Oct. 31, 1988, 88-2 CPD ¶ 417.

The record shows that in making her determination, the contracting officer considered a number of factors. As indicated, the Customs Service most recently contracted for background investigation services in 1988 under a total small business set-aside, under which the protesters' four contracts were awarded. Although this procurement history favors a set-aside for the current procurement and although it appears likely that all four of these small businesses would submit offers, the contracting officer concluded that those firms currently lacked the capacity to provide the additional effort which would be required under this contract. Documents provided to us by the Customs Service show that the contracting officer focused on two factors. First, data available to her indicated that the total number of investigators approved and cleared by the Office of Personnel Management for these four small businesses is limited, averaging only 69 investigators per firm. By contrast, the fifth contractor has over 750 investigators. Second, she noted that 45 percent of the case work assigned to three of the four small businesses was performed unsatisfactorily and was returned to the contractors because of major deficiencies. Only one of these small businesses has consistently performed well. This current experience persuaded the contracting officer that there was no reasonable expectation that the agency's projected caseload could be satisfactorily processed under its current contractual arrangements.

Also, we note that the contracting officer obtained the approval for the withdrawal of the small business set-aside from the department's small business program manager, within the Office of Small and Disadvantaged Business Utilization.

We find that the contracting officer was acting within her discretion in issuing the RFP on an unrestricted basis because the level of work relating to this solicitation, a predicted 6,000 cases, is substantially greater than can be processed satisfactorily under the current set-aside procurements. In this regard, we give great weight to the fact that the contracting officer's determination was made with the concurrence of the small business program manager. See Fayetteville Group Practice, Inc., 66 Comp. Gen. 489 (1987), 87-1 CPD ¶ 541.

Accordingly, the protest is denied.

for Robert A. Hinchman
James F. Hinchman
General Counsel